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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INLAND-ROME, INC., formerly known
as GEORGIA KRAFT COMPANY,
Petitioner,

v.

C.L. RHODES, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Can the appellate courts of Georgia refuse to apply the Federal Arbitration Act (the "FAA") and, contrary to the Supremacy Clause and numerous applicable precedents of this Court, decline to enforce an arbitration agreement in a 65-year, 6400 acre timber purchase contract between Georgia landowners and a multi-state paper and forest products manufacturer incorporated in Delaware, solely on the ground that the underlying contract does not call for shipments of the subject timber "across state lines" and, therefore, "does not affect interstate commerce"?

2. Whether the recently enacted 9 U.S.C. § 15 preempts contrary state law and prohibits state appellate courts from granting interlocutory appeals to review trial court orders compelling arbitration pursuant to the Federal Arbitration Act under circumstances where such appeals are prohibited by the federal statute?

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LIST OF PARTIES

The parties to this appeal are Inland-Rome, Inc.,* formerly known as Georgia Kraft Company, as Petitioner; and C.L. Rhodes, Jr., individually, and in his representative capacity as executor of the estate of C.L. Rhodes, deceased, and in his representative capacity as executor of the estate of Cleo K. Rhodes, deceased; Jane C. Rhodes; Susan Rhodes Harris; C.L. Rhodes, III; and Boyd C. Rhodes, as Respondents.

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* The companies to be listed in accordance with Sup. Ct. Rule 29.1 are Temple-Inland, Inc. and Inland Container Corporation I.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, Inland-Rome, Inc., formerly known as Georgia Kraft Company (hereinafter "Inland-Rome"), respectfully requests that a Writ of Certiorari issue to review the opinion of the Court of Appeals of the State of Georgia entered on March 5, 1990, reversing an order of the Superior Court of Greene County, Georgia, entered on March 7, 1989, which had granted Inland-Rome's motion to compel arbitration and to stay the proceeding under the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3, 4.

OPINIONS BELOW

The Georgia Court of Appeals' opinion, entered on March 5, 1990, is reported at 195 Ga. App. 39, 392 S.E.2d 270. It is reprinted in the appendix hereto, pp. 1a-5a, *infra*.

The Georgia Court of Appeals' order granting respondents' application for an interlocutory appeal, entered on April 13, 1989, is reprinted in the appendix hereto, p. 6a, *infra*.

The order of the Superior Court of Greene County, Georgia (Parrott, J.), granting Inland-Rome's motion to

compel arbitration and to stay the proceeding, entered on March 7, 1989, is reprinted in the appendix hereto, pp. 7a-8a, *infra*.

The Greene County Superior Court's "Certificate for Immediate Review," entered on March 10, 1989, is reprinted in the appendix hereto, p. 9a, *infra*.

The Georgia Supreme Court's order dated May 2, 1990, denying Inland-Rome's petition for a writ of certiorari, is reprinted in the appendix hereto, p. 11a, *infra*.

JURISDICTION

On March 5, 1990, the Georgia Court of Appeals issued an opinion reversing the Greene County Superior Court's order compelling arbitration and staying the proceeding under the FAA, 9 U.S.C. §§ 3, 4. The Supreme Court of the State of Georgia denied Inland-Rome's petition for a writ of certiorari on the federal arbitration issue on May 2, 1990.

The jurisdiction of the Court to review the opinion of the Georgia Court of Appeals is invoked under 28 U.S.C. § 1257(a). Inland-Rome claims a right by virtue of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the Supremacy Clause of the United States Constitution, to the judicial enforcement of its contractual right to arbitrate the disputes raised in this case, notwithstanding any state law to the contrary. It is therefore claiming a "right, privilege, or immunity . . . under the Constitution . . . or statutes of . . . the United States" within the meaning of 28 U.S.C. § 1257(a). Inland-Rome also claims that the FAA preempts Georgia's interlocutory appeal statute, O.C.G.A. § 5-6-34(b), as interpreted and applied in this case, and thus "the validity of a statute of . . . [a] State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States" under 28 U.S.C. § 1257(a).

The Court has twice held that where an intermediate state appellate court has refused to enforce an arbitra-

tion agreement under the FAA, and the highest state appellate court denies discretionary review of that decision, the intermediate court's decision is a "[f]inal judgment[] or decree[] rendered by the highest court of a state in which a decision could be had" for purposes of 28 U.S.C. § 1257(a). *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989). In *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984), another arbitration case, the Court held that the decision of a state court that finally decides a federal issue under the FAA is immediately appealable where " 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.' " *Id.* at 6, 104 S.Ct. at 856 (bracketed material in opinion) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1039-40 (1975)). "For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course," the Court explained, "would defeat the core purpose of a contract to arbitrate." *Southland Corp. v. Keating*, 465 U.S. at 7-8, 104 S.Ct. at 857.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Commerce Clause, art. I, § 8, cl. 3, and the Supremacy Clause, art. VI, cl. 2, of the United States Constitution. The federal statutes involved are the Federal Arbitration Act, 9 U.S.C. §§ 1, 2, 3, 4 and 15, and 28 U.S.C. § 1292(b). The Georgia interlocutory appeal statute at issue is section 5-6-34(b) of the Official Code of Georgia Annotated. Because the constitutional provisions and statutes are lengthy, they are reproduced in the appendix, at pp. 12a-16a, *infra*.

STATEMENT OF THE CASE

This case involves a dispute over the interpretation of a 65-year commercial timber purchase contract between individual respondents resident in Georgia and petitioner Inland-Rome, a multi-state timber and paper company which manages 1.2 million acres of timberland and purchases three million "cords" of wood annually for its six mills located throughout the southeastern United States. (R. 4, 18, 604.) The 1957 contract and an accompanying lease cover 6400 acres owned by respondents. Inland-Rome entered into the contract with respondents "for the purpose of acquiring a sufficient amount of pine pulpwood to supply [its] forest products facilities." (R.604.)

Since 1957 Inland-Rome, a Delaware corporation, has paid the Georgia respondents the sum of $1,429,882 and has harvested approximately 111,200 "cords" of wood from respondents' lands pursuant to the contract. (R. 253-56, 391-409.) The timber harvested from respondents' lands was transported to Inland-Rome's Georgia mills and used to manufacture lumber products shipped to delivery points in many states around the country. (R. 603-05.) Prior to the Georgia Court of Appeals' surprising *sua sponte* holding, respondents had never contended that the subject contract did not involve interstate commerce.

Inland-Rome's contract payments to respondents were sent through the United States mail. (R. 34, 64.) The contract provided that Inland-Rome's annual payments to respondents would be adjusted based upon changes in the nationwide wholesale price index published by the United States Department of Labor. (R. 20-21.) The accounting records which the contract required Inland-Rome to maintain (R. 27) have been audited by accounting personnel from Texas employed by Inland-Rome's parent corporation, which is also a Delaware corporation. (R. 391-92.)

The parties expressly agreed in the contract that any dispute arising "at any time" concerning certain subjects requiring specialized knowledge of the forestry industry would be resolved not by litigation before a judge or jury, but through binding arbitration before a panel of forestry experts. (R. 27.) Respondents have filed a complaint alleging that Inland-Rome has breached the contract. The arbitration clause clearly applies to the technical forestry disputes raised in this case. Respondents now prefer a jury trial in their home county to such arbitration, and claim that the arbitration agreement is unenforceable under applicable Georgia law.

On October 26, 1988, after having demanded arbitration in its answer, Inland-Rome filed a motion to compel arbitration and to stay the proceeding pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3, 4. Although respondents opposed Inland-Rome's arbitration motion on other grounds, they never argued that the contract did not evidence a transaction involving interstate commerce, or that the FAA did not apply to the contract. After conducting a hearing and considering briefs, the Superior Court of Greene County granted Inland-Rome's arbitration motion on March 7, 1989, necessarily finding that the contract evidenced a transaction involving interstate commerce, and issued a "Certificate for Immediate Review" permitting respondents to petition the Georgia Court of Appeals for an interlocutory review on March 10, 1989.

Inland-Rome opposed respondents' petition to the Georgia Court of Appeals for permission to pursue an interlocutory appeal of the trial court's arbitration order. Inland-Rome argued that the newly enacted appeals section of the FAA, 9 U.S.C. § 15, expressly prohibited an interlocutory appeal of an order granting a motion to compel arbitration under the FAA, except under narrow circumstances clearly not present here. Without any discussion, the Georgia Court of Appeals ignored Inland-Rome's argument and the federal decisions it cited and

granted respondents' application for an interlocutory appeal.

In an opinion dated March 5, 1990, the Georgia Court of Appeals reversed the Greene County Superior Court's order compelling arbitration and staying the action under the FAA. *Rhodes v. Inland-Rome, Inc.*, 195 Ga. App. 39, 392 S.E.2d 270 (1990). The opinion is reprinted in the appendix, pp. 1a-5a, *infra*. Disregarding controlling federal statutory and judicial authority, including decisions of this Court and of the United States Courts of Appeals which were brought to its attention, the Georgia Court of Appeals held the FAA applies only to contracts requiring by their terms the actual shipment of goods across state lines; that the contract in question did not expressly so require [1]; and that the federal statute consequently did not apply to the contract. *Id.* at 40, 392 S.E.2d at 271, appendix at p. 3a. This was the sole basis for the court's ruling on the federal arbitration issue. The Georgia court ignored all of the federal decisions under the FAA, and did not cite or distinguish any federal decisions in its opinion. The court then held that the arbitration agreement in the contract was unenforceable under Georgia's common law which refuses enforcement of arbitration agreements.

Thereafter, despite extensive briefing and citations to decisions relating to the applicability of the FAA and the Commerce Clause, the Georgia Court of Appeals denied Inland-Rome's motion for rehearing, and the Georgia Supreme Court denied Inland-Rome's petition for a writ of certiorari on the federal arbitration issue. Appendix at p. 11a. Inland-Rome then timely filed this petition.

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[1] Respondents have never disputed Inland-Rome's evidence that the contract did result in such interstate shipments (R. 603-05), and prior to the Georgia Court of Appeals' decision, they never argued that the FAA did not apply to the contract.

REASONS FOR GRANTING THE WRIT

I. IN REVERSING THE TRIAL COURT'S ORDER COMPELLING ARBITRATION AND HOLDING THAT THE FEDERAL ARBITRATION ACT (THE "FAA") DOES NOT APPLY TO THE CONTRACT AT ISSUE BECAUSE IT DOES NOT EXPRESSLY REQUIRE SHIPMENTS ACROSS STATE LINES, THE GEORGIA COURT OF APPEALS' OPINION IGNORES THE FAA AND THE SUPREMACY CLAUSE, DIMINISHES THE JURISDICTIONAL REACH OF THE COMMERCE CLAUSE, AND IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEALS.

Section 2 of the FAA, as federal substantive law, declares enforceable in all federal and state courts any arbitration provision "in any . . . contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "Commerce," as used in the FAA, means interstate commerce. *See* U.S.C. § 1.

"Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983). The very purpose of the FAA is to overturn "the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 14, 104 S.Ct. 852, 860 (1984).

This Court has commanded that "these [arbitration] agreements must be 'rigorously enforced.'" *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 2526 (1987)

(quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242 (1985)). This Court has emphasized repeatedly that state courts are bound, under the Supremacy Clause of the United States Constitution, to apply the substantive provisions of the FAA to lawsuits pending in state court. *Perry v. Thomas*, 482 U.S. at 489-491, 107 S.Ct. at 2525-26; *Southland Corp. v. Keating*, 465 U.S. at 15-16, 104 S.Ct. at 859-60; *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 25, 103 S.Ct. at 942.

Notwithstanding the FAA, many states, including Georgia, continue to be hostile to arbitration agreements and have erected numerous barriers under state law to judicial enforcement of these agreements. *See, e.g., Perry v. Thomas, supra* (holding that the FAA preempted a California statute which authorized employees to maintain a lawsuit for wages "without regard to the existence of any private agreement to arbitrate"); *Southland Corp. v. Keating, supra* (holding that the FAA preempted a California statute construed to require judicial consideration of claims brought under a franchise statute, notwithstanding the existence of an arbitration agreement); *Securities Industry Association v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct 2559 (1990) (holding that the FAA preempted Massachusetts regulations "patently inhospitable to arbitration").

Here, the Georgia Court of Appeals has ignored the preemptive effect of the FAA on such hostile state common law. In direct contravention of this Court's decisions requiring state courts under the Supremacy Clause to enforce the FAA in lawsuits pending in state courts, the Georgia Court of Appeals has declared that it will not enforce the FAA unless the contract at issue provides for the actual shipment of goods across state lines:

> Clearly, the contract between [Inland-Rome] and [respondents] does not itself relate to the interstate

> shipment of any product. To the contrary, it relates solely to the sale of standing timber located exclusively in Georgia. . . . Under [Inland-Rome's] expansive construction of the scope of the Federal Arbitration Act, there would scarcely ever be occasion to apply state arbitration principles in a case involving a Georgia timber purchase contract since any timber that is sold and cut in Georgia can ultimately find its way, in some form or another, into another state. The Federal Arbitration Act obviously has not, as a matter of law, preempted application of state arbitration principles in each and every Georgia timber purchase contract case.

195 Ga. App. at 40, 392 S.E.2d at 271, appendix at p. 3a. The Georgia Court of Appeals made this statement but did not cite or distinguish any federal decisions anywhere in its opinion.

The Georgia Court of Appeals' opinion is directly contrary to prior decisions of this Court, which were brought to its attention but not acknowledged in its opinion. In *Perry v. Thomas, supra*, the Court held, in emphasizing "the preemptive effect of the Federal Arbitration Act" and reversing another state court's refusal to enforce an arbitration agreement under the FAA, that the "Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause*." 482 U.S. at 490, 107 S.Ct. at 2526 (emphasis added).

This Court has specifically rejected the Georgia Court of Appeals' holding that the FAA applies only to contracts which involve the actual interstate shipment of a product. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), this Court expressly refused to limit the applicability of the FAA to " 'contracts between merchants for the interstate shipment of goods,' " an interpretation which the Court described as a "curious narrowing of the statute." *Id.* at 401 n.7, 87 S.Ct. at 1805 n.7. The Court quoted from the House Re-

port accompanying the FAA: " 'The control over interstate commerce . . . reaches not only the actual physical interstate shipment of goods *but also contracts relating to interstate commerce.*' " *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)) (emphasis added).

The Georgia Court of Appeals' opinion is contrary not only to this Court's decisions and the legislative history of the FAA, but also to the decisions of the United States Courts of Appeals. Their decisions have similarly emphasized that the scope of the FAA's coverage extends not merely to contracts for the interstate shipment of goods, but to the very limit of Congress' plenary authority to regulate interstate commerce under the Commerce Clause. *See Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986) ("The requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause."); *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 513 (1984) ("Congress intended the FAA to apply to all contracts that it constitutionally could regulate."); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986) ("Commerce under the FAA is not limited to interstate shipment of goods, . . . but includes all contracts 'relating to interstate commerce.' ").

The undisputed record evidence in this case, summarized above, established beyond any doubt that the commercial timber purchase contract at issue affected interstate commerce sufficiently to satisfy the Commerce Clause and require enforcement of the FAA. The Georgia Court of Appeals' opinion is tantamount to a ruling that Congress is without constitutional authority under the Commerce Clause to regulate any aspect of the timber purchase contract at issue, regardless of whether the subject is arbitration, environmental regulation, civil rights, federal labor and employment laws, antitrust, or

any other field of federal regulation based upon the Commerce Clause.

This Court should issue a writ of certiorari in this case because the Georgia Court of Appeals' opinion is clearly erroneous and in direct conflict with this Court's decisions under the FAA. This is especially important because the Georgia Court of Appeals has deliberately disregarded this Court's decisions construing the FAA, cases which were brought to its attention but ignored in its opinion.

This Court should also issue a writ of certiorari because the uniform and consistent application of the FAA in state courts is crucial to the enforcement of voluntary arbitration agreements. A significant contraction of the scope of the FAA and of the Commerce Clause by a state appellate court in a published decision, unless corrected, will encourage other states hostile to mandatory arbitration to avoid the FAA in a similar fashion. Indeed, there is evidence that the state courts have already begun to recognize how best to avoid the requirements of the FAA without explicitly rejecting the statute or the state's Supremacy Clause obligations. *See, e.g., Ex parte Warren*, 548 So. 2d 157 (Ala. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 554 (1989) (White and Blackmun, J.J., would have granted certiorari) (holding that the FAA did not apply to a retail automobile purchase contract between an Alabama dealership and Alabama residents because the FAA applies only to contracts where the parties "contemplated substantial interstate activity")[2]; *accord, Ex parte Williams*, 555 So. 2d 146 (Ala.

[2] In *Ex parte Warren*, the contract at issue was a retail sales contract between Alabama consumers and an Alabama dealership for the purchase and sale of one automobile to be used solely for personal and not commercial purposes. Here, in contrast, the contract is a 65-year, 6400 acre commercial timber purchase contract between Georgia residents and a multi-state timber and paper company incorporated in Delaware, pursuant to which the corporation has paid

1989) (same; following *Ex parte Warren*); *see also Burke County Public Schools v. Shaver*, 303 N.C. 408, 279 S.E.2d 816 (1981) (adopting the same restrictive "contemplated substantial interstate activity" standard for applying the FAA).

Certiorari review is indispensable to full implementation of the FAA in state courts. The overwhelming majority of cases involving a petition to enforce arbitration agreements governed by the FAA are and will be brought in state courts under circumstances where the cases cannot be removed to federal district courts. As this Court has previously noted in another arbitration case, "the overwhelming proportion of all civil litigation in this country is in the state courts." *Southland Corp. v. Keating*, 465 U.S. at 15 & n.8, 104 S.Ct. 860 & n.8 ("It is estimated that 2% of all civil litigation in this country is in the federal courts."). Consequently, if the strong federal objectives and policies represented by the FAA are to be vindicated, the FAA must be enforced fully, consistently and uniformly at the state level. Only by means of certiorari review in appropriate cases can this Court ensure that these important federal policies are not eroded by the states in subtle ways, as in the Georgia Court of Appeals' decision here.

$1,429,882 and harvested 111,200 "cords" of wood. (R. 253-56, 391-409.) There is no dispute that the harvested timber has been used to manufacture lumber products shipped to delivery points in many states around the country. (R. 603-05.)

II. IN ACCEPTING AN INTERLOCUTORY APPEAL OF A TRIAL COURT'S ORDER COMPELLING ARBITRATION PURSUANT TO THE FAA, UNDER CIRCUMSTANCES WHERE AN INTERLOCUTORY APPEAL WOULD CLEARLY BE PROHIBITED BY THE FAA, THE GEORGIA COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE NEW APPEALS SECTION OF THE FAA, 9 U.S.C. § 15, DOES NOT PREEMPT CONTRARY STATE LAW, AND THEREBY DECIDED WRONGLY AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

"Congress' clear intent, in the [Federal] Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 22, 103 S.Ct. at 940. This Court has declared that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. at 7, 104 S.Ct. at 856. "[T]he unmistakably clear congressional purpose [was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 404, 87 S.Ct. at 1806.

A prohibition against immediate appeals of orders compelling arbitration under the FAA is absolutely necessary to protect and to further the substantive policies of the FAA. To permit one party to an arbitration agreement immediately to appeal a trial court's order compelling arbitration, before the arbitration is completed, defeats the very purpose of the FAA of "mov-

[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

> Arbitration is an expeditious and inexpensive mode of alternative dispute resolution. Allowing interlocutory appeals of such orders would defeat the attractiveness of arbitration by imposing delay and additional expense. . . . Immediate appealability would thus detract from the broad federal policy in favor of arbitration, emphasized repeatedly by the Supreme Court.

Zosky v. Boyer, 856 F.2d 554, 561-62 (3d Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 868 (1989).

On November 19, 1988, with knowledge that this Court had held the substantive provisions of the FAA were applicable in both federal and state courts, Congress amended the FAA to confirm that a prohibition against immediate appeals of orders compelling arbitration is an inseparable part of the FAA's substantive provisions. Newly enacted section 15 of the FAA, 9 U.S.C. § 15 (1988)[2], states in pertinent part:

> (b) except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

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[2] This amendment became effective on February 17, 1989, 90 days after enactment, and before the Greene County Superior Court's arbitration order. *See* Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, 4671.

As a matter of federal law, a party may now pursue an appeal from an order compelling arbitration under the FAA *only* after the arbitration is completed, except under the narrow circumstances permitted by 28 U.S.C. § 1292(b). *See* 9 U.S.C. § 15(a)(1)(D) and (E). In contrast, an order denying a motion to compel arbitration or to stay the proceeding under the FAA is immediately appealable under 9 U.S.C. § 15(a)(1)(A) and (B).

In direct contravention of section 15 of the FAA and federal policy favoring "rapid and unobstructed enforcement of arbitration agreements," Georgia law strongly favors the immediate appeal of any order compelling arbitration, even under the FAA. In *Phillips Construction Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 299 S.E.2d 538 (1983), the Georgia Supreme Court stated:

> Because of the unnecessary delay and expenses to the parties of an incorrect determination of whether judicial proceedings should be stayed pending arbitration, *we recommend that the trial courts, except in the clearest cases, certify* [for an immediate appeal pursuant to O.C.G.A. § 5-6-34(b), Georgia's interlocutory appeal statute] *orders granting or denying such stays.* Although our decision that orders granting or denying motions to stay judicial proceedings pending arbitration should be certified for interlocutory review except in the clearest cases runs counter to the principle that piecemeal appeals are to be avoided, we find that judicial economy favors interlocutory appeals in such cases.

Id. at 490, 299 S.E.2d at 540 (emphasis added). This admonition concerning immediate appeals of interlocutory orders under O.C.G.A. § 5-6-34(b) applies only to arbitration orders. In its opinion below, the Georgia Court of Appeals expressly stated that it granted respondents' application for an interlocutory appeal pursuant to the Georgia Supreme Court's command in *Phillips Construction Co. See* 195 Ga. App. at 40, 392 S.E.2d at 271, appendix at p. 2a.

This Court has repeatedly held that the FAA preempts any state law that actually conflicts with the FAA. In *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989), another arbitration case arising out of a state court, this Court stated that "even when Congress has not completely displaced state regulation in an area [such as arbitration], state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at ——, 109 S.Ct. at 1255 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 67 S.Ct. 399, 404 (1941)). The issue in determining whether the FAA preempts state law is whether the state law at issue "would undermine the goals and policies of the FAA." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. at ——, 109 S.Ct. at 1255.

The FAA preempts O.C.G.A. § 5-6-34(b) to the extent that Georgia courts have interpreted and applied that statute in a discriminatory fashion to encourage interlocutory appeals of orders compelling arbitration under the FAA. As applied to Georgia state court orders compelling arbitration under the FAA, and as interpreted and applied by the Georgia Supreme Court in *Phillips Construction Co.*, Georgia's interlocutory appeal statute is in direct conflict with the policy objectives and technical requirements of the FAA. The enforcement of the Georgia statute in the manner required by the Georgia Supreme Court "would undermine the goals and policies of the FAA" of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," and of promoting the "rapid and unobstructed enforcement of arbitration agreements."

Therefore, the Georgia Court of Appeals erred in relying on O.C.G.A. § 5-6-34(b) to permit review of an order compelling arbitration under the FAA. Nor can respond-

ents "cure" the error by arguing that the order meets the exceptional circumstacnes of 28 U.S.C. § 1292(b). The Greene County Superior Court did not find, nor did respondents ever argue or suggest, that the trial court's arbitration order "involves a controlling question of law as to which there is substantial ground for difference of opinion," as required by 28 U.S.C. § 1292(b).

The Court should issue a writ of certiorari because the FAA's prohibition against interlocutory appeals of orders compelling arbitration is a crucial provision supporting the FAA's substantive provisions. To permit state courts strongly to encourage interlocutory appeals of orders compelling arbitration under the FAA, as Georgia does here, defeats the purpose of the FAA. To hold that the substantive provisions of the FAA apply in state courts, but allow the states to apply their procedural provisions in a discriminatory manner to frustrate arbitration and to eliminate its attractiveness as an alternative dispute resolution mechanism, will allow the states effectively to nullify the FAA. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 24, 103 S.Ct. at 941 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural policies* to the contrary." (emphasis added).

The Court should also issue a writ of certiorari because this Court has not considered whether the newly enacted section 15 of the FAA may preempt or otherwise invalidate state procedural provisions that are used to thwart the substantive policies of the FAA. The Court has expressly reserved for future decision the issue whether the "procedural provisions" of the FAA apply in state court proceedings. *Volt Information Sciences v. Board of Trustees*, 489 U.S. at —— n.6, 109 S.Ct. at 1254 n.6; *Southland Corp. v. Keating*, 465 U.S. at 16 n.10, 104 S.Ct. at 861 n.10. The Court should accept this case so that it can make clear that, regardless of whether the procedural

provisions of the FAA technically apply in state court, an issue the Court need not decide, the states may *not* use their own procedural provisions to defeat the substantive policies of the FAA, at least not by allowing interlocutory appeals from orders compelling arbitration pursuant to the FAA under circumstances where such appeals are prohibited by the FAA.

CONCLUSION

For all the reasons stated, Inland-Rome's petition for a writ of certiorair should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINIONS AND ORDERS

Opinion of the Court of Appeals
of the State of Georgia

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. A89A1620

C.L. RHODES, JR., *et al.*,
Plaintiffs-Appellants,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant-Appellee.

Appeal from the Superior Court
of Greene County, Georgia
John Lee Parrott, Judge, Presiding

Filed: March 5, 1990

Before: CARLEY, Chief Judge, and
McMURRAY and BEASLEY, Judges.

In 1957, appellant-plaintiffs entered into a 65-year Timber Purchase Contract with appellee-defendant. In

1986, appellants notified appellee that they considered that the contract had been breached. Appellee responded by invoking the arbitration clause of the contract. Appellants then filed suit against appellee, seeking the following relief: the enjoining of cutting and removal of timber; the enjoining of any arbitration; a declaration that the contract was null and void; and, damages for breach of contract. Appellee answered, denying that the contract had been breached and asserting that appellants were required to arbitrate, and it also filed a counterclaim. The trial court granted a permanent injunction, finding that appellee's breach of the contract gave appellants the right to terminate it and that, under these circumstances, the arbitration clause of the contract did not apply. On appeal, the Supreme Court affirmed the trial court's grant of a permanent injunction. *Georgia Kraft Co. v. Rhodes*, 257 Ga. 469 (360 SE2d 595) (1987).

Thereafter, appellants amended their complaint to add additional claims against appellee. Appellee filed an amended answer, wherein it renewed its assertion that appellants were required to arbitrate. After a period of discovery, appellee moved for an order to compel arbitration and stay judicial proceedings and appellants moved for summary judgment as to appellee's counterclaims. The trial court granted appellee's motion and denied appellants' motion. The trial court certified for immediate review its order granting appellee's motion. Pursuant to *Phillips Constr. Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488 (299 SE2d 538) (1983), we granted appellants' application for an interlocutory appeal from the trial court's order.

1. The motion to transfer this appeal to the Supreme Court is denied.

2. Appellee asserts that arbitration is mandated by the Federal Arbitration Act because the timber purchase contract involves interstate commerce. In support of this assertion, appellee cites evidence showing that the timber, once it has been cut, is removed for processing in certain

Georgia facilities and is subsequently shipped as lumber products to points throughout the country.

Clearly, the contract between appellee and appellants does not itself relate to the interstate shipment of any product. To the contrary, it relates solely to the sale of standing timber located exclusively in Georgia. Compare *Brockett Points Shopping Center, Inc. v. Development Contractors, Inc.*, —— Ga. App. —— (Case Number A89A1854, decided November 22, 1989). Appellee's evidence shows merely its own unilateral involvement in interstate commerce occurring only after its performance under the contract with appellants has long since been completed. Under appellee's expansive construction of the scope of the Federal Arbitration Act, there would scarcely ever be occasion to apply state arbitration principles in a case involving a Georgia timber purchase contract since any timber that is sold and cut in Georgia can ultimately find its way, in some form or another, into another state. The Federal Arbitration Act obviously has not, as a matter of law, preempted application of state arbitration principles in each and every Georgia timber purchase contract case. See generally *Pope v. Continental Augusta Woodlands, Inc.*, 169 Ga. App. 874 (315 SE2d 307) (1984). There being no evidence to authorize a finding of the applicability of the Federal Arbitration Act in the instant case, the trial court erred in finding that arbitration was mandated thereunder.

3. The Supreme Court has previously held that the clause in this contract would not be enforceable as a binding arbitration agreement under applicable state arbitration principles. "Georgia law has historically authorized agreements to binding arbitration of existing disputes. [Cit.] However, it appears that the contractual imposition of the duty to arbitrate as an exclusive and binding remedy for disputes which arise in the future is limited to construction contracts. [Cit.]" *Georgia Kraft Co. v. Rhodes*, supra at 472 (2). Since the clause provid-

ing for arbitration of future disputes in this nonconstruction contract would not otherwise be enforceable as an *exclusive and binding* arbitration provision, the only issue to be resolved is "whether the money claims are subject to arbitration as a *prerequisite to suit. . . .*" (Emphasis supplied.) *Georgia Kraft Co. v. Rhodes*, supra at 472 (2).

"[U]nder state law an arbitration provision that limits its applicability to questions such as the amount of loss or damage and requires arbitration as a condition precedent to a right of action upon the contract itself will be enforced. [Cits.]" *CCC Builders, Inc. v. City Council of Augusta*, 237 Ga. 589, 591 (229 SE2d 349) (1976). Even assuming that the instant arbitration clause is otherwise properly limited in its scope, it nevertheless fails to provide that arbitration shall only constitute a condition precedent to initiation of suit. "In an early case the Supreme Court held: 'It has often been held, that an agreement to refer matters in dispute, to arbitration, is not sufficient to oust the Courts of Law or Equity of their jurisdiction.' [Cit.] Unless the agreement provides that the parties shall arbitrate their differences as a condition precedent to a right to sue, a party may resort to the courts to settle a dispute. [Cits.]" *Millican Elec. Co., Inc. v. Fisher*, 102 Ga. App. 309, 311 (3) (116 SE2d 311) (1960). It follows that the instant arbitration clause is not enforceable as a condition precedent to appellants' initiation of suit on the contract, and that the trial court erred in granting appellee's motion to compel arbitration and stay the judicial proceedings.

4. Appellants enumerate as error the denial of their motion for summary judgment on appellee's counterclaims. Appellants' contention is that the decision of the Supreme Court in *Georgia Kraft Co. v. Rhodes*, supra, establishes their entitlement to judgment as a matter of law on appellee's counterclaim.

There is considerable doubt whether the Supreme Court's decision established the law of the case as to any

issue other than the validity of the grant of a permanent injunction on the evidence then before the trial court and whether it has any bearing whatsoever on the issues scheduled for trial before a jury. However, even accepting appellants' broad interpretation of the principle of the law of the case, their motion for summary judgment was nevertheless properly denied. At most, the Supreme Court's decision could be said to have established only appellants' right to terminate the contract based upon appellee's breach thereof. Appellee's counterclaims are in no way inconsistent with appellants' termination of the contract. To the contrary, appellee's counterclaims are predicated upon appellants' termination of the contract and seek a recovery for prepaid timber which was unharvested prior to that termination. "Recoupment and set-off lie for overpayments. . . ." *Wiseberg v. Novelty Hat Mfg. Co.*, 3 Ga. App. 362 (2) (59 SE 1112) (1908). The trial court correctly denied summary judgment in favor of appellants as to appellee's counterclaims.

5. The grant of appellee's motion to compel arbitration and stay judicial proceedings is reversed. The denial of appellants' motion for summary judgment is affirmed.

Judgment affirmed in part and reversed in part. McMurray, P. J., and Beasley, J., concur.

Order of the Court of Appeals
of the State of Georgia

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Application No. A89I0086

C.L. RHODES, JR., *et al.*,
Plaintiffs-Appellants,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant-Appellee.

Appeal from the Superior Court
of Greene County, Georgia
John Lee Parrott, Judge, Presiding

Filed: April 13, 1990

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of the Superior Court is directed to include a copy of this order in the record transmitted to the Court of Appeals.

/s/ _____
VICTORIA MCLAUGHLIN
Clerk, Court of Appeals
State of Georgia

Order of the Superior Court of
Greene County, Georgia
March 7, 1989

IN THE SUPERIOR COURT OF GREENE COUNTY
THE STATE OF GEORGIA

Civil Action No. 86-CV-160

C.L. RHODES, JR., *et al.*,
Plaintiffs,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant.

ORDER TO COMPEL ARBITRATION AND TO STAY THE PROCEEDING

The Defendant's Motion to Compel Arbitration And To Stay The Proceeding have been heard before the Court on December 6, 1988,

IT IS HEREBY ORDERED:

(a) that pursuant to § 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (1982) the Plaintiffs and Defendant are compelled to arbitrate their claims that (1) the Defendant used poor forestry practices in managing their lands, (2) the Plaintiffs have suffered damages because of Defendant's change from a stick scaling or volumetric method to a weight scaling method of measuring cords of wood removed from their lands, and (3) the Defendant failed to maintain appropriate accounting records of Plaintiffs' cord credit account;

(b) that any dispute concerning the said three issues shall be resolved by three (3) arbitrators, including a forestry expert acting as chairperson, as provided in the Timber Purchase Contract between the parties;

(c) that pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 3 the instant action is stayed pending the arbitrators' findings on the above-stated issues;

(d) that the Court vacates any portion of the order dated December 8, 1986, that may be construed as precluding the arbitration of the three issues specified above; and

(e) that, as an exception to the above-stated stay of proceeding, each party shall be permitted to conduct discovery of the opposing party or parties' experts including without limitation the taking of depositions of the said experts.

SO ORDERED, this 7th day of March, 1989.

/s/ _____

JOHN LEE PARROTT
Judge, Superior Courts
Ocmulgee Judicial Circuit

Order of the Superior Court of
Greene County, Georgia
March 10, 1989

IN THE SUPERIOR COURT OF GREENE COUNTY
THE STATE OF GEORGIA

Civil Action No. 86-CV-160

C.L. RHODES, JR., *et al.*,
Plaintiffs,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant.

CERTIFICATE FOR IMMEDIATE REVIEW

At request of the plaintiffs the Court hereby certifies (pursuant to O.C.G.A. § 5-6-34(b)) that the Order of this Court signed March 7, 1989, entered March 9, 1989, to compel arbitration and stay this proceeding is of such importance to this case that immediate review should be had.

So ordered and certified this 10th day of March, 1989.

/s/ _____
JOHN LEE PARROTT, Judge
SUPERIOR COURTS OCMULGEE
JUDICIAL CIRCUIT

PRESENTED BY:

/s/ _____

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SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 02, 1990

A. STEPHENS CLAY
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Case No. S90C0939

INLAND-ROME, INC., f/k/a GEORGIA KRAFT COMPANY

v.

C. L. RHODES, JR., et al.

COURT OF APPEALS CASE NO. A89A1620

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

/s/ Joline B. Williams
JOLINE B. WILLIAMS, Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the United States Constitution states, in relevant part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; . . .

Article 6, clause 2 of the United States Constitution states, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Federal Arbitration Act (the "FAA"), as amended, 9 U.S.C. § 1, *et seq.*, states in pertinent part:

> . . . "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy there-

after arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service therefor shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the mak-

ing of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 15 of the FAA states:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court

> of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 5-6-34(b) of the Official Code of Georgia Annotated states, in relevant part:

> (b) Where the trial judge in rendering an order, decision, or judgment not otherwise subject to direct appeal, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. . . .